

# EMPLOYEE BENEFITS AND THE PARADOX OF SAME-SEX MARRIAGES AND EQUAL RIGHTS

Dean Agnos\*

*The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.<sup>1</sup>*

## I. INTRODUCTION

As Americans grow up, most view marriage as an important and achievable goal. Presumably, the challenge many see relating to that goal is meeting the right partner and maintaining a solid relationship. And most never question their right to get their bond recognized by the government or realize the benefits that they receive from that license. However, for same-sex couples, the situation is vastly different. Until recently, committed and consenting same-sex couples have been denied any marriage rights—rights which heterosexual couples so often take for granted.<sup>2</sup> For decades, same-sex couples have striven to achieve equal marriage rights, with little success. Many of those who oppose marriage rights for same-sex couples ignore the significance and benefits that result from the legal status created by civil marriage, while using vague arguments, rooted in religion, about the “sanctity of marriage” to justify

---

\* J.D. candidate, 2006, University of Pennsylvania Law School; B.A., 2003, University of Pennsylvania.

1. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

2. See generally MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, CTRS FOR DISEASE CONTROL AND PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS NO. 323, ADVANCE DATA: FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES 5 tbl.3 (May 31, 2001), available at <http://www.cdc.gov/nchs/data/ad/ad323.pdf> (reporting that within the first twenty years of marriage, fifty percent end in divorce).

discrimination against homosexuals and same-sex couples.<sup>3</sup>

In 2003, same-sex marriage came much closer to reality when, in *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court issued a powerful ruling that intensified the national debate about and accelerated the movement towards marriage rights for same-sex couples.<sup>4</sup> The court held that any prohibition on same-sex marriage violated the state constitution.<sup>5</sup> As a result of that ruling, in 2004—thirty-seven years after the Supreme Court noted that marriage is a fundamental right<sup>6</sup>—Massachusetts became the first and only state in the nation to grant marriage licenses to same-sex couples.<sup>7</sup> These are the same licenses used for opposite-sex couples. Therefore, same-sex couples should be treated no differently than opposite-sex couples and should receive the same legal rights, privileges, and benefits conferred on opposite-sex couples who marry. States and the federal government confer on married couples numerous rights and benefits, from tax filing benefits to property rights to hospital visitation rights. Many of those benefits provided by marriage directly relate to employment (and indirectly relate to family),<sup>8</sup> but same-sex couples are very limited in their ability to create the same benefits by contracting between each other.<sup>9</sup> Making matters worse, the Defense of

3. See generally Zachary A. Kramer, Commentary, *Marriage Should Be Open to All Who Honor It*, CHI. TRIB., Jan. 18, 2004, § 1, at 8 (noting that politicians and courts use the term “sanctity of marriage” to support their belief that the marital relationship is the foundation of society—and that society will be threatened if homosexuals are permitted to marry). See also *Bush Backs Ban on Gay Marriage*, CHI. TRIB., Dec. 17, 2003, § 1, at 16:

Bush has said he would support whatever is “legally necessary to defend the sanctity of marriage.” . . . [T]he president said rulings such as the one in Massachusetts “undermine the sanctity of marriage” . . . “I do believe in the sanctity of marriage . . . but I don’t see that as conflict with being a tolerant person or an understanding person,” he said.

*Id.* But cf. Booth Moore, *For a Few Minutes, At Least ‘I Do’*, L.A. TIMES, Jan. 6, 2004, at E1 (“Although [Britney Spears’] marriage to Jason Allen Alexander was annulled Monday just 36 hours after the couple said ‘I do’ . . . it’s a relief to see the tradition of the quickie celebrity wedding is still intact.”).

4. 798 N.E.2d 941 (2003).

5. *Id.*

6. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

7. See Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16 (describing the beginning of same-sex marriage in Massachusetts as a result of *Goodridge*).

8. See *Marriage is a Worker’s Issue*, GAY & LESBIAN ADVOCATES & DEFENDERS, at 1 (2004), available at <http://www.glad.org/rights/marriageisaworkersissue.pdf> (“[M]arriage confers automatic protections and responsibilities that are now essential for sustaining families. Wages are not the only bread and butter issue. Marriage, too, decisively affects a worker’s ability to adequately protect herself and her family.”).

9. See *id.* at 4 (“While gay and lesbian families can provide limited protections for themselves by creating wills, partnership agreements, or other documents, so can everyone

Marriage Act<sup>10</sup> prevents many of those benefits created at the federal level from being shared by same-sex married couples while raising the possibility that an employer could use the definition of marriage in that Act to deny even more marital rights and privileges in the workplace. Until same-sex couples receive equal marriage rights at both the state and the federal levels, discriminatory workplace treatment is unavoidable.

## II. SAME-SEX MARRIAGE AT THE STATE LEVEL

### A. *Early Challenges to State Bans on Same-Sex Marriage Were Largely Unsuccessful*

While *Goodridge* was a significant event, it was neither the first nor the last step in the push towards equal marriage rights. The first legal fight occurred in 1971, when two men in Minnesota challenged a county's denial of their request for a marriage license.<sup>11</sup> They argued that the absence of sex-specific language in the state's marriage laws indicated that the state legislature intended to permit same-sex marriage.<sup>12</sup> The couple relied on the Supreme Court's statement in *Loving* that marriage is a fundamental right and further argued that the county's and the state's denials of their request to marry violated both the Due Process and the Equal Protection Clauses of the United States Constitution.<sup>13</sup> The Minnesota State Supreme Court rejected these arguments and held that denying same-sex couples the right to marry is not unjust.<sup>14</sup> The court also differentiated same-sex couples from interracial couples in order to distinguish the case from *Loving*—and avoid implicating the Fourteenth Amendment.<sup>15</sup> The Minnesota court stated that

*Loving* does indicate that not all state restrictions upon the right to marry are beyond the reach of the Fourteenth Amendment. But in common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.<sup>16</sup>

Notably, the court relied on religion in support of its decision. It referred to

---

else, and no one considers these a substitute for marriage. The vast majority of legal protections and obligations simply cannot be contracted.”).

10. U.S.C.A. § 7 (2004) and 28 U.S.C.A. § 1783C (2004). See discussion *infra* Part III.A.1.

11. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

12. *Id.* at 185–86.

13. *Id.*

14. See *id.* at 187 (“There is no irrational or invidious discrimination.”).

15. See *id.* (noting that the miscegenation law in *Loving* was invalidated because it was based purely on race, not something fundamental like sex).

16. *Id.*

the Bible when it proclaimed that marriage is an institution, between a man and a woman, for procreation and the rearing of children.<sup>17</sup> In addition to involving church with state, this religion-based argument ignores the many functions that marriage serves, from creating property rights to hospital visitation rights to spousal benefits.

Two years later in 1973, a lesbian couple in Kentucky made a similar challenge that was also unsuccessful.<sup>18</sup> Like Minnesota, Kentucky's marriage statute lacked any sex-specific language. The couple contended that "the failure of the clerk to issue the license deprived them of three basic constitutional rights, namely, the right to marry; the right of association; and the right to free exercise of religion."<sup>19</sup> To clarify the ambiguity, the court referred to different dictionaries, all of which defined marriage as between a man and a woman.<sup>20</sup> Yet, despite the multiple supporting definitions of marriage that the court quoted, it did not go so far as to say that the Kentucky statute prohibits marriage between two persons of the same-sex. Rather than using those definitions as an interpretive tool in its analysis, the court relied almost entirely on the the definitions themselves in order to reject the women's claim. "[The women] are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."<sup>21</sup>

In *Singer v. Hara*, one year after *Jones*, a male same-sex couple in Washington argued that their inability to marry violated the state's Equal Rights Amendment, which requires that both sexes be treated equally under the law, and the Eighth, Ninth, and Fourteenth Amendments of the United States Constitution.<sup>22</sup> The Court of Appeals of Washington rejected the couple's argument that permitting marriage between a man and a woman but prohibiting it between two men constructs an unconstitutional classification "on account of sex."<sup>23</sup> It held that the United States Constitution protects individuals against invidious discrimination based on sex or race, but that sexual orientation is different from sex.<sup>24</sup> Moreover, it held that denying marriage to same-sex couples does not violate the Equal Rights Amendment because the Act only applies once an individual demonstrates that he or she was denied something solely because of his or

---

17. *Id.* at 186.

18. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

19. *Id.* at 589.

20. *Id.*

21. *Id.*

22. 522 P.2d 1187 (1974).

23. *Id.* at 1195.

24. *See id.* at 1196 ("Appellants were not denied a marriage license because of their sex . . .").

her sex—and same-sex marriage is not prohibited solely because of sex.<sup>25</sup>

*B. Baehr v. Lewin Temporarily Brings Hawaii Close to Permitting Marriage Between Same-Sex Couples*

It was not until almost twenty years later that proponents of the legalization of same-sex marriage achieved their first major legal victory. In *Baehr v. Lewin*, three same-sex couples argued that a Hawaii statute banning same-sex marriage violated their right to privacy and equal protection as guaranteed by the state's constitution.<sup>26</sup> The statute, passed in 1985, states that marriage contracts may only be granted to relationships "between a man and a woman . . . ."<sup>27</sup> The Hawaii Supreme Court looked to federal case law and found that there had been no previous recognition of a fundamental right to marry for same-sex couples.<sup>28</sup> It then looked to tradition and declined to extend the fundamental right to marry to same-sex couples:

[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex

---

25.

We are of the opinion that a common-sense reading of the language of the ERA [Equal Rights Amendment] indicates that an individual is afforded no protection under the ERA unless he or she first demonstrates that a right or responsibility has been denied solely because of that individual's sex. Appellants are unable to make such a showing because the right or responsibility they seek does not exist. The ERA does not create any new rights or responsibilities, such as the conceivable right of persons of the same sex to marry one another; rather, it merely insures that existing rights and responsibilities, or such rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex. The form of discrimination or difference in legal treatment which comes within the prohibition of the ERA necessarily is of an invidious character because it is discrimination based upon the fortuitous circumstance of one's membership in a particular sex per se.

*Id.* at 1194.

26. 852 P.2d 44 (Haw. 1993).

27. HAW. REV. STAT. ANN. § 572-1 (2004). *But cf.* HUMAN RIGHTS CAMPAIGN FOUNDATION, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 2003 31 tbl.5 (2003) (featuring a table that indicates that in 1991 Hawaii became only the second state in the country to prohibit sexual orientation discrimination in the workplace).

28. *Id.* at 56 ("[T]he federal construct of the fundamental right to marry—subsumed within the right to privacy implicitly protected by the United States Constitution—presently contemplates unions between men and women.").

marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.<sup>29</sup>

Although the court rejected the plaintiffs' privacy claim, it held that they had an equal protection claim because the ban on same-sex marriage was a form of sex discrimination, which is explicitly prohibited by the Hawaii Constitution.<sup>30</sup> "[T]he Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex."<sup>31</sup> The court remanded the case and stated that because the ban on same-sex marriage is a sex-based classification, strict scrutiny must apply.<sup>32</sup> "[T]he burden will rest on [the state] to overcome the presumption that [the ban] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights."<sup>33</sup> On remand, the state argued that same-sex families have a negative impact on children. The trial judge held that the state had failed to overcome strict scrutiny and could no longer deny same-sex couples the right to marry.<sup>34</sup> However, a stay was granted pending appeal<sup>35</sup> and before the appeal was heard, a referendum was passed by Hawaii voters which amended the state constitution to permit the legislature to prohibit same-sex marriage (thereby giving effect to the state law that the plaintiffs originally challenged).<sup>36</sup> In

---

29. *Id.* at 57.

30. *Id.* at 59–60 (citing HAW. CONST. art. I, § 5).

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

HAW. CONST. art. I, § 5.

31. *Baehr*, 852 P.2d at 60.

32. *Id.* at 65.

33. *Id.* at 68.

34. *Baehr v. Miike*, 1996 WL 694235, at \*22 (Haw. Cir. Ct. Dec. 3, 1996).

35. *Id.* at \*2.

36. See PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1319 (Paul Brest et al. eds., 2000) (noting that Hawaii voters amended the state constitution in order to make a ban on same-sex marriage permissible).

In response to *Baehr v. Lewin* Hawaii voters passed a referendum in March 1999 which amended the state constitution to give the state legislature the power "to reserve marriage to opposite sex couples." Arguably, although the amendment makes a ban on same sex-marriages constitutional under Hawaii law, it could still be challenged as unconstitutional under the Federal Equal Protection Clause (that is, if one believes that the decision in *Baehr* could also have been reached on federal equal protection grounds).

1999, the Hawaii Supreme Court overturned the previous decision in *Baehr* and held that “[i]n light of the marriage amendment, [the state’s ban on same-sex marriage] must be given full force and effect.”<sup>37</sup> Although the equal marriage rights movement experienced a setback when the state legislature supported the ban on same-sex marriage, the regression was arguably mitigated because the state legislature contemporaneously extended some of the rights traditionally reserved to married couples to same-sex couples.<sup>38</sup> The stated purpose of the Hawaii Reciprocal Beneficiaries Law is to “extend certain rights and benefits which [were previously] available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law[,]”<sup>39</sup> and it achieves this by allowing a partner to sue for wrongful death, permitting inheritance rights without a will, and granting hospital visitation rights and property rights, among others.<sup>40</sup> So while *Baehr* failed to provide same-sex couples with the right to marry, it did result in a net gain of legal rights that had previously come only from marriage.<sup>41</sup>

---

*Id.*

37. *Baehr v. Miike*, 1999 Haw. LEXIS 391, at \*6–7 (Haw. Dec. 9, 1999) (“The marriage amendment validated [the state’s ban on same-sex marriage] by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to same-sex couples.”).

38. *See Hawaii Gives Gay Couples Marital Benefits*, N.Y. TIMES, July 10, 1997, at B7 (“Starting today, many of the benefits offered to married people in Hawaii will become available to gay couples, and also to siblings and roommates, under a first-in-the-nation law that was enacted to head off homosexual marriages.”); although the benefits of the newly extended rights are great, one might argue that they are not a step forward because the rights, although an improvement, remained unequal and were enacted to stave off same-sex marriage.

39. HAW. REV. STAT. ANN. § 572C-1.

40. *See Hawaii Marriage/Relationship Recognition Law*, HUMAN RIGHTS CAMPAIGN FOUNDATION, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=23101&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Jan. 6, 2006) (“Couples secure the following benefits from a reciprocal beneficiary relationship: inheritance without a will, ability to sue for the wrongful death of their reciprocal beneficiary, hospital visitation and health care decisions, consent to postmortem exams, loan eligibility, property rights . . . tort liability and protection under Hawaii domestic violence laws.”)

41. *But cf. Hawaii State Law: Domestic Partnership*, LAMBDA LEGAL, available at <http://www.lambdalegal.org/cgi-bin/iowa/states/record?record=11> (last visited Jan. 27, 2006) (“Employee health benefits were part of the initial law. But coverage for private employees was judged in court to be preempted by federal law, and the state employee provision phased out in 2000. Thus, at present, the law no longer includes health benefits for any employees.”)

C. *Baker v. State Leads Vermont to Grant Same-Sex Couples the Right to Form Civil Unions, Giving the Couples Many of the Same Rights as Marriage*

In 1997, before the *Baehr* decision had been overturned but after the Defense of Marriage Act<sup>42</sup> (DOMA) was enacted, three same-sex couples in Vermont who were refused marriage licenses filed suit against the state and the three towns that had rejected their respective requests in *Baker v. State*.<sup>43</sup> The three couples, two of whom have children, had been together for periods ranging from four to twenty-five years, but were precluded from marrying each other.<sup>44</sup> The trial court dismissed their suit, holding that the marriage statute, which strongly suggested that marriage is between one man and one woman, did not permit the issuance of marriage licenses to two people of the same sex.<sup>45</sup> The trial court also held that limiting marriage to opposite-sex couples is constitutional because it “rationally further[s] the State’s interest in promoting ‘the link between procreation and child rearing.’”<sup>46</sup>

On appeal, the Vermont Supreme Court reversed the trial court’s decision.<sup>47</sup> The court ignored any religious or moral arguments and focused on statutes and the state constitution.<sup>48</sup> The court concluded that the state legislature clearly intended to limit marriage to opposite-sex relationships (a conclusion that even the plaintiffs do not deny), but that the Common Benefits Clause of the Vermont Constitution requires the state “to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”<sup>49</sup> Although the same benefits and

---

42. See 1 U.S.C.A. § 7 (2004) (limiting marriage for all federal functions to only opposite-sex couples).

43. See 744 A.2d 864, 867–68 (Vt. 1999) (describing that the denial of marriage licenses to the three same-sex couples resulted in their lawsuit).

44. *Id.* at 867.

45. See *id.* (summarizing the trial court’s holding in which it dismissed the plaintiffs’ suit).

46. See *id.* (quoting the trial court’s finding of a valid state purpose).

47. *Id.*

48. See *id.* (“The issue before the Court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.”).

49. *Id.* The Vermont Supreme Court relied heavily on, and quoted, the Common Benefits Clause of the Vermont Constitution which reads, in part:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . .

VT. CONST., ch. I, art 7.



protections must be offered to same-sex couples, the court permitted the legislature to provide these benefits and protections through something different from marriage, such as domestic partnership.<sup>50</sup> The Vermont legislature passed the Vermont Civil Unions Law, limiting marriage to opposite sex couples but creating civil unions for same-sex couples.<sup>51</sup> On April 26, 2000, Governor Howard Dean signed the law, which entitled same-sex couples to form civil unions that provide the same rights as marriage in certain areas of taxes, inheritance, and medical decision-making, among others.<sup>52</sup> Since July 1, 2000, same-sex couples—still denied the right to marry—have formed civil unions in Vermont.<sup>53</sup> But the battle for same-sex marriage rights has waged on—and has become even more intense—since civil unions were first permitted in Vermont.

*D. San Francisco Defies California Law by Marrying Gay Couples, Which Were Later Halted and Voided by a State Court*

On February 12, 2004, Phyllis Lyon and Del Martin, two elderly San Francisco women, participated in a simple—but meaningful—act for advocates of equal marriage rights for same-sex couples.<sup>54</sup> Phyllis and Del, who had been living together for more than fifty years, became the first same-sex couple to be married in the United States when San Francisco Mayor Gavin Newsom “defied state law and issued marriage licenses to same-sex couples.”<sup>55</sup> Mayor Newsom refused to enforce the state’s ban on same-sex marriage because he believes that the ban violates the state constitution’s due process and equal protection clauses.<sup>56</sup> California

---

50. See *Baker*, 744 A.2d at 867 (“Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel ‘domestic partnership’ system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must . . . afford all Vermonters the common benefit, protection, and security of the law.”).

51. See VT. STAT. ANN. Tit 15, ch. 23 (creating many of the same benefits of marriage without the same status, for same-sex couples who form a civil union).

52. See *Governor of Vermont Signs Gay-Union Law*, N.Y. TIMES, Apr. 26, 2000, at A17 (stating that Governor Dean signed the law, which gives same-sex couples “all of the rights and responsibilities available to married couples in areas like taxes, inheritance and medical decision-making.”).

53. See Carey Goldberg, *In Vermont, Gay Couples Head for the Almost-Altar*, N.Y. TIMES, July 2, 2000, §1 at 10 (“On [July 1] Vermont’s new law creating marriage-like civil unions officially came into effect . . .”).

54. Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24.

55. Rachel Gordon, *Legal Battle Looms: City Hall Ceremonies Spur Constitutional Showdown, Injunction Threat*, S.F. CHRON., Feb. 13, 2004, at A1.

56. See *id.* (describing Mayor Newsom’s rationale for issuing marriage licenses to same-sex couples). See also CAL. CONST. art. I, § 7 (“A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . .”).

Governor Arnold Schwarzenegger, on the other hand, referred to the marriages as “an imminent risk.”<sup>57</sup> However, the California Supreme Court soon halted the granting of marriage licenses in San Francisco to same-sex couples and months later, voided the marriages, stating that, by issuing marriage licenses to same-sex couples, Mayor Newsom had violated a state law that defines marriage as a union between a man and a woman.<sup>58</sup> The court’s decision in *Lockyer v. San Francisco* does not address the constitutionality of the state’s ban on same-sex marriage.<sup>59</sup> Rather, it held that Mayor Newsom lacked the authority to determine the constitutional validity of a state law.<sup>60</sup> Newsom tried to minimize the significance of the *Lockyer* decision and promised that San Francisco would continue its lawsuit against the state’s ban on same-sex marriage.<sup>61</sup>

“It is wrong to deny tens of millions of Americans the same rights and privileges that people like myself . . . have been afforded just through happenstance because we married somebody of a different gender,” the mayor said. “This ruling is merely a temporary delay in our ongoing struggle for equality.”<sup>62</sup>

With Mayor Newsom and the City of San Francisco moving forward with their suit against the state’s current law, there might be good reason to find hope in Newsom’s words. After the court’s ruling in his favor, state Attorney General Lockyer hinted that he supported Newsom’s view on the validity of the law, despite the fact that he believed Newsom had wrongly

---

A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.”).

57. See *Schwarzenegger Fights Gay Unions*, BBC NEWS, Feb. 21, 2004, available at <http://news.bbc.co.uk/2/hi/americas/3508969.stm> (“California Governor Arnold Schwarzenegger has told his top legal official to act against the city of San Francisco for allowing gay marriages.”).

58. See Bob Egelko, *A Mayor Overruled: Newsom Found to Violate California Law by Issuing Same-Sex Licenses*, S.F. CHRON., Aug. 13, 2004, at A1 (describing why the California Supreme Court struck down the marriages). See also case cited *infra* note 59.

59. 95 P.3d 459 (Cal. 2004).

To avoid any misunderstanding, we emphasize that the substantive question of the constitutional validity of California’s statutory provisions limiting marriage to a union between a man and a woman is not before our court in this proceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue.

*Id.* at 464.

60. *Id.* at 464 (“[I]n the absence of a judicial determination that such statutory provisions are unconstitutional, local executive officials lacked authority to issue marriage licenses to . . . same-sex couples, and marriages conducted between same-sex couples in violation of the applicable statutes are void and of no legal effect.”).

61. Ilene Lechuk, *Newsom, Unbowed by Decision, Says he is ‘More Resolved Than Ever,’* S.F. CHRON. Aug. 13, 2004, at A15 (describing Mayor Newsom’s response to the California Supreme Court’s decision in *Lockyer*).

62. See Egelko, *supra* note 58.

overstepped his bounds.<sup>63</sup>

Even more promising is the recent action by the California Assembly. Less than thirteen months after the state supreme court's defeat of gay marriage in San Francisco, equal rights proponents achieved yet another victory. On September 1, 2005, the state Senate "in a historic vote watched across the country, approved [the Religious Freedom and Civil Marriage Protection Act] . . . that would legalize same-sex marriage in California."<sup>64</sup> Days later, on September 6, the California Assembly approved the same bill, "making [the California] legislature the first in the nation to deliberately approve same-sex marriages."<sup>65</sup> However, the battle in California is far from over: Governor Schwarzenegger vetoed the bill,<sup>66</sup> removing—or at least delaying—the possibility that California employers and employees would soon find themselves in a similar situation as those in Massachusetts after *Goodridge*.<sup>67</sup>

*E. Massachusetts Supreme Judicial Court Forces Commonwealth to Provide the Same Marriage Rights to Gay Couples as to Heterosexual Couples*

Just a few months prior to the San Francisco marriages, the Supreme Judicial Court of Massachusetts issued a groundbreaking decision. In *Goodridge v. Department of Public Health*, the court considered "whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."<sup>68</sup> The legal battle began when seven same-sex couples filed a complaint challenging their inability to marry.<sup>69</sup> The court recognized the moral arguments for and

---

63. *Id.* ("[Lockyer] called the mayor's action courageous, cited his own duty to defend the law and said the court had upheld 'the important legal principle that nonjudicial elected officials do not have the authority to declare a state law unconstitutional.'").

64. Lynda Gledhill & Wyatt Buchanan, *Bill to Let Gays Wed Wins State Senate OK; Leno's Measure Faces Fight in Assembly*, S.F. CHRON., Sept. 2, 2005, at A1 (describing the 21-to-15 vote).

65. Joe Dignan & John Pomfret, *California Legislature Approves Gay Marriage*, WASH. POST, Sept. 7, 2005, at A1 (summarizing the historic vote and noting that Governor Schwarzenegger is in a "difficult position").

66. Nancy Vogel & Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005, at B3. See also John Pomfret, *California Governor to Veto Bill Authorizing Same-Sex Marriage*, WASH. POST, Sept. 8, 2005, at A4 ("In a statement . . . the governor [says] he opposes the legislation . . . because he thinks the matter should be decided by California's courts or its voters.").

67. See discussion *infra* Part II.E.

68. 798 N.E.2d 941, 948 (Mass. 2003).

69. See *id.* at 949–50 (indicating that when each couple attempted to get married, after filling out the proper forms and following the necessary procedures, their attempts were either refused or rejected).

against equal marriage rights for same-sex couples, but considered neither.<sup>70</sup> Instead, the court used the Massachusetts and United States constitutions to guide its analysis.<sup>71</sup> It noted that the Supreme Court's decision in *Lawrence v. Texas*<sup>72</sup> affirmed that the Fourteenth Amendment precludes the government from interfering with an individual's ability to choose his or her life partner,<sup>73</sup> but focused its decision on the Massachusetts Constitution, which it considered potentially even more protective of individual liberty and equality than the United States Constitution.<sup>74</sup> Civil marriage is a contract among three parties: the two people who are forming a union and the state which grants the union legal status that "bestows enormous private and social advantages on those who choose to marry."<sup>75</sup>

The plaintiffs asserted that the state's refusal to extend marriage to same-sex couples violated both equal protection and due process.<sup>76</sup> The court declined to consider whether a fundamental right or suspect class was involved (both of which would require strict scrutiny), because the state

---

70. *See id.* at 948.

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us.

*Id.*

71. *See id.* ("Our obligation is to define the liberty of all, not to mandate our own moral code.") (quoting *Lawrence v. Texas*, 539 U.S. 558, 559 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

72. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas sodomy law which the court said "seek[s] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.").

73. *See Goodridge*, 798 N.E.2d at 948 ("[In *Lawrence*], the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner.").

74. *See id.* at 948-49 ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.").

75. *Id.* at 954. *See also id.* at 955-56 (describing the many benefits that married couples receive, including property rights, state income tax joint filings, inheritance rights, shared medical policies, and spousal pension benefits, among others).

76. *See id.* at 960 (noting that the couples based their argument on equal protection and due process grounds). *See also* Reply Brief of Plaintiff-Appellants at 20, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJ-08860) ("The right to be free from government classifications and limiting generalizations on the basis of sex and otherwise is part of our constitutional tradition and the equality guaranties of Arts. I, VI, VII, and X.").

had failed to show any rational basis, a lower standard than strict scrutiny, for the marriage ban.<sup>77</sup> The state unsuccessfully argued three rationales for its ban on same-sex marriage: (1) the primary purpose of marriage is procreation; (2) opposite-sex couples are best suited to be parents; and (3) limiting marriage to one man and one woman protects state and private financial resources.<sup>78</sup> In rejecting the state's arguments, the court noted that the state's marriage ban "identifies persons by a single trait and then denies them protection across the board."<sup>79</sup> The court noted that "civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing," because until recently, "heterosexual relations were the only means . . . by which children could come into the world."<sup>80</sup> But in tearing apart the state's three arguments, the court stated that "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."<sup>81</sup> Because the state was unable to even demonstrate a rational basis for the marriage ban, the court ruled that the state could not limit civil marriages to opposite-sex couples.<sup>82</sup> "Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality . . . ."<sup>83</sup>

In its historic decision, the court held that the prohibition was an unnecessary and unjustified form of discrimination that must be halted.<sup>84</sup> The court gave the legislature 180 days to determine a way to rectify the

---

77. See *Goodridge*, 798 N.E.2d at 968:

The department has had more than ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions. It has failed to do so. The department has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children. It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex.

*Id.*

78. See *id.* at 961 (summarizing the state's three arguments).

79. *Id.* at 962 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)). See also *id.* at 962 ("In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.").

80. *Id.* at 961–62 n.23.

81. *Id.*

82. See *id.* at 968 ("The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason.").

83. *Id.* at 968.

84. See *id.* at 969 ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

situation,<sup>85</sup> and the senate asked the court to clarify whether it could enact a bill that prohibited same-sex couples from marrying, but allowed them to form civil unions that offered all the same rights, benefits and protections as marriage.<sup>86</sup> The opinion offered by the court stated that the proposed bill was unconstitutional:

Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid . . . . The history of our nation has demonstrated that separate is seldom, if ever, equal.<sup>87</sup>

With *Goodridge*, Massachusetts went a step further than Vermont. On May 16, 2004, Massachusetts became the first state to offer same-sex couples the same right to marry as opposite-sex couples.<sup>88</sup>

### III. SAME-SEX MARRIAGE AT THE FEDERAL LEVEL

#### A. *The Defense of Marriage Act Defines Marriage as Between a Man and a Woman for All Federal Purposes and Purportedly Protects States' Rights*

*Goodridge* is the biggest victory so far in the long and continuing fight for equal rights. The struggle over equal marriage rights has been long—from *Baker v. Nelson* in 1971 to 2003's *Goodridge*—and is far from over. But just as there has been progress, there have also been setbacks. Before *Baehr* was overturned, the possibility of same-sex marriage became very real—and politicians reacted. The Defense of Marriage Act (DOMA) was proposed as a direct response to *Baehr*.<sup>89</sup> DOMA's two stated purposes are: (1) protecting the institution of traditional heterosexual marriage; and (2) protecting the rights of states to determine what recognition, if any, they give to same-sex marriages from other states.<sup>90</sup> To effectuate these

---

85. *Id.* at 970 ("Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.").

86. See Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (stating that the senate requested the court's opinion on the constitutionality of a proposed bill that would provide same-sex couples with a union similar to, but different than, civil marriage).

87. *Id.* at 569.

88. See, Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16 (describing the beginning of same-sex marriage in Massachusetts as a result of *Goodridge*).

89. See H.R. REP. NO. 104-664, at 2 (1996) (stating that the bill "is a response to a very particular development in the State of Hawaii").

90. *Id.* (indicating the purposes of DOMA).

purposes, DOMA is split into two parts. The first part prevents a state from being forced to recognize a same-sex marriage from another state.<sup>91</sup> The second part adopts a federal definition of spouse:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>92</sup>

President Clinton signed DOMA into law in a midnight ceremony on Sept. 22, 1996, even though no state at the time provided same-sex couples with the right to marry.<sup>93</sup> But although it was enacted in anticipation of a state offering equal marriage rights to same-sex couples, a possibility that became a reality post-*Goodridge*, many opponents of same-sex marriage pushed for stronger federal "protection" of "traditional" marriage.

*B. Proposed Amendment to the United States Constitution Would Ban States From Permitting Same-Sex Marriage*

On Jan. 24, 2005, the Federal Marriage Amendment (FMA), a proposed constitutional amendment that restricts marriage to opposite-sex couples, was re-introduced to the U.S. Senate by Sen. Wayne Allard.<sup>94</sup> The Federal Marriage Amendment states that:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution nor the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon

---

91. See 28 U.S.C.A. § 1783C (2004).

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

*Id.*

92. 1 U.S.C.A. § 7 (2004).

93. Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21 ("President Clinton waited until the dead of night yesterday to sign legislation aimed at preventing gay marriages, timing his action to minimize public attention and contain any political damage just 45 days before the election.").

94. See *Federal Marriage Amendment*, HUMAN RIGHTS CAMPAIGN FOUNDATION, available at [http://www.hrc.org/Template.cfm?Section=Federal\\_Constitutional\\_Marriage\\_Amendment](http://www.hrc.org/Template.cfm?Section=Federal_Constitutional_Marriage_Amendment) (last visited Jan. 10, 2006) (providing background information on the Federal Marriage Amendment). The form of the FMA was originally introduced to the U.S. Senate on May 21, 2005 by Rep. Marilyn Musgrave. *Id.*

unmarried couples or groups.<sup>95</sup>

The FMA goes farther than DOMA but it also contradicts one of DOMA's stated purposes: protecting states' rights.<sup>96</sup> After the San Francisco marriages, President George W. Bush pledged his support for FMA,<sup>97</sup> which, if passed, would become the first amendment to the Constitution that actually restricts a minority group's rights, rather than protects them. In announcing his support for FMA, President Bush said that "[a]ctivist courts have left the people with one recourse. . . . [O]ur nation must enact a constitutional amendment to protect marriage in America."<sup>98</sup> The President's argument presupposes that states are unable to "protect" marriage themselves, but three states had already passed their own constitutional amendments limiting marriage to opposite-sex couples.<sup>99</sup> President Bush's support for FMA helped draw attention to the issue of same-sex marriage and after the 2004 elections, an additional thirteen states had adopted their own constitutional amendments to outlaw same-sex marriages.<sup>100</sup> Although FMA failed,<sup>101</sup> the revised version has been submitted to the full Committee on the Constitution.<sup>102</sup>

---

95. Proposing an Amendment to the Constitution of the United States Relating to Marriage, H.R.J. Res. 56, 108th Cong. (2003) (introducing the resolution, which is commonly referred to as the Federal Marriage Amendment, that would amend the Constitution to forbid states from permitting same-sex marriage).

96. Compare H.R. REP. NO. 104-664, at 2 (1996) (describing that one of DOMA's two main purposes is to protect a state's right to decide whether it will recognize same-sex marriages from other states) with Proposing an Amendment to the Constitution of the United States Relating to Marriage, H.R.J. Res. 56, 108th Cong. (2003) (proposing that states be stripped of the authority to grant same-sex couples the right to marry).

97. Press Release, President Calls for Constitutional Amendment Protecting Marriage, The White House, Feb. 24, 2004, available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (last visited Nov. 29, 2005) (announcing President Bush's support for the Constitutional amendment).

98. *Id.*

99. See Equality from State to State 2004: Gay, Lesbian, Bisexual and Transgender Americans and State Legislation, HUMAN RIGHTS CAMPAIGN FOUNDATION, at n.2 (2004) (noting that Alaska (1998), Nebraska (2000), and Nevada (2002) had amended their constitutions prior to 2004 to limit marriage to opposite-sex couples).

100. See *id.* ("By the end of 2004, an additional thirteen states had amended their state constitutions—Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Ohio, Oklahoma, Oregon, North Dakota, and Utah."). See also Map: Statewide Marriage Laws, HUMAN RIGHTS CAMPAIGN, available at <http://www.hrc.org> (follow "Marriage" hyperlink; then follow "Map: Statewide Marriage Laws" hyperlink) (illustrating that two more states have passed such amendments, raising the total to eighteen); Alexa H. Bluth, *Measures Seek to Ban Gay Marriage*, SACRAMENTO BEE, July 31, 2005, at A3 (reporting that voter initiatives seek to amend the California constitution so it bans gay marriage and to revoke already existing domestic partnership benefits).

101. See HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 99, at n.10 ("Attempts to amend the U.S. Constitution to ban same-sex marriage failed in the U.S. Senate on July 14, 2004, and in the U.S. House of Representatives on Sept. 30, 2004.").

102. Key Dates in the Battle Over the Marriage Protection Amendment available at



#### IV. RECONCILING THE FEDERAL POLICY ESTABLISHED BY DOMA WITH THE STATE LAWS RECOGNIZING SAME-SEX MARRIAGES, AS THEY RELATE TO EMPLOYEE RIGHTS AND BENEFITS

##### A. *Marriage Is a Status That Provides Other Important Rights*

Marriage not only symbolizes the union between two committed individuals, but also provides the basis for many legal rights, privileges, and benefits. As a result, same-sex couples are treated differently, lacking many legal rights and privileges to which heterosexual couples are entitled. The court in *Goodridge* stressed the significance of a marriage license and the rights granted thereby. "The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The Department of Public Health stated that 'hundreds of statutes' are related to marriage and to marital benefits."<sup>103</sup> States and the federal government provide tax incentives for married couples. As a result, same-sex couples must pay higher income taxes and cannot file jointly.<sup>104</sup> Additionally, same-sex couples are denied a long list of basic protections that married couples receive. Same-sex couples can be denied hospital visitation and medical decision-making rights for each other.<sup>105</sup> For married couples, these rights are automatic.<sup>106</sup> Bi-national same-sex couples are often forced to separate because Americans are not given the right to petition for their partners to immigrate.<sup>107</sup> Married couples not only receive greater and automatic inheritance rights, but the surviving spouse does not have to pay estate taxes. In contrast, same-sex partners must will any property that they wish to leave to each other and the surviving partner must pay estate taxes on the property inherited from the deceased

---

<http://www.hrc.org> (follow "Marriage" hyperlink, then follow "Federal Marriage Amendment"; then follow "Key Dates in the Battle Over the 'Marriage Protection Amendment'" hyperlink) (last visited Dec. 5, 2005).

103. 798 N.E.2d at 955. See also *id.* at 955–56 (listing many of the benefits of marriage, including specific privileges and rights relating to tax, property, inheritance, medical policies and health coverage, and pension systems).

104. See *Answers to Questions About Marriage Equality*, HUMAN RIGHTS CAMPAIGN FOUNDATION, at 5 (2004), available at [http://www.hrc.org/Template.cfm?Section=Get\\_Invo](http://www.hrc.org/Template.cfm?Section=Get_Invo) lved1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=17262 (noting that same-sex couples pay higher taxes).

105. See *id.* at 4 ("Married couples have the automatic right to visit each other in the hospital and make medical decisions. Same-sex couples can be denied the right to visit a sick or injured loved one in the hospital.").

106. See *id.*

107. See *id.* ("Americans in binational relationships are not permitted to petition for their same-sex partners to immigrate. As a result, they are often forced to separate or move to another country.").

partner.<sup>108</sup> Same-sex couples are denied the legal right that married couples possess to live together in nursing homes.<sup>109</sup> And same-sex couples are also denied the protection that married couples are given from being forced to sell their homes to cover nursing home bills.<sup>110</sup> Additionally, the retirement savings of married couples receive much greater protection than those of same-sex couples. A person ends up paying up to 70% in taxes and penalties on a 401(k) inherited from a deceased partner; a surviving spouse can roll the funds of the inherited 401(k) into an IRA tax-free.<sup>111</sup>

1. Homosexuals Are Faced With Disparate, and Therefore Unfair, Treatment in the Workplace Because Marriage Has a Significant Impact on Workplace Benefits

Many of the legal benefits and protections of marriage are directly related to employment. At least one of the couples in *Goodridge* (and presumably more) desired the right to marry so they could receive work-related benefits that require marriage:

Gary Chalmers and Richard Linnell alleged that “‘Gary pays for a family health insurance policy at work which covers only him and their daughter because Massachusetts law does not consider Rich to be a ‘dependent.’ This means that their household must purchase a separate individual policy of health insurance for Rich at considerable expense. . . . Gary has a pension plan at work, but . . . that plan does not allow him the same range of options in providing for his beneficiary that a married spouse has and thus he cannot provide the same security to his family that a married person could if he should predecease Rich.’”<sup>112</sup>

The situation that Gary Chalmers and Richard Linnell have faced is not uncommon. Except for those in Massachusetts and Vermont,<sup>113</sup> the

---

108. *See id.* (explaining the heightened tax requirements a partner faces for inheriting property from his or her deceased partner).

109. *See id.* at 5 (“Married couples have a legal right to live together in nursing homes. Because they are not legal spouses, elderly gay or lesbian couples do not have the right to spend their last days living together in nursing homes.”).

110. *See id.* (describing the denial of home protection which is afforded to married seniors).

111. *See id.* (“While a married person can roll a deceased spouse’s 401(k) funds into an IRA without paying taxes, a gay or lesbian American who inherits a 401(k) can end up paying up to 70 percent of it in taxes and penalties.”).

112. *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 950 n.6 (Mass. 2003) (referring to the complaint which alleged many of the circumstances in which the couples and their families had been harmed because they lacked the full legal protections of civil marriage).

113. *See* Deborah L. Markowitz, Secretary of State, The Vermont Guide to Civil Unions, available at <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html> (“Parties to a

estimated 3.1 million<sup>114</sup> people living together in same-sex relationships around the country are precluded from receiving many of the same benefits that their married co-workers receive. While most public and private employers provide medical insurance to spouses of employees, few provide such coverage to same-sex partners of employees, and when it is provided, the employee must pay income taxes on the value of the insurance.<sup>115</sup> All workers pay payroll taxes. However, unlike married couples, same-sex partners do not receive Social Security payments after the death of a partner.<sup>116</sup> Because most pension plans pay survivor benefits only to a legal spouse, a surviving same-sex partner is also denied pension benefits.<sup>117</sup> A partnered gay worker is also denied the family leave benefits to which a married employee is legally entitled. While an employer may permit a gay worker unpaid leave to care for a sick partner or a new child, the gay worker is not entitled to that leave.<sup>118</sup> There are countless other benefits of marriage in the employment context, including, to list just two, access to the Consolidated Omnibus Budget Reconciliation Act of 1985<sup>119</sup> (COBRA) which protects spouses from losing health insurance when the employee is laid off, and access to worker's compensation when a spouse is injured at work.<sup>120</sup> The denial to same-sex couples of benefits provided to married couples harms same-sex partnerships financially and emotionally<sup>121</sup> and perpetuates the notion that their relationships are less real or significant.

---

civil union are given all the same benefits, protections and responsibilities under Vermont law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil law, as are granted to spouses in a marriage.") (last visited Jan. 7, 2006).

114. *Answers to Questions About Marriage Equality*, HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 103, at 3 (2004).

115. *See id.* at 5 (indicating that same-sex partners are much less likely to receive health insurance and when they can get it, the employee must pay income taxes on it, which reduces the benefit received).

116. *See id.* at 4 ("Married people receive Social Security payments upon the death of a spouse. Despite paying payroll taxes, gay and lesbian partners receive no Social Security survivor benefits—resulting in an average annual income loss of \$5,528 upon the death of a partner.").

117. *See id.* at 5 (noting that most pension plans limit survivor benefits to a legal spouse).

118. *See id.* (stating that married employees are legally entitled to unpaid leave to care for a spouse, whereas an employee with a same-sex partner receives no such entitlement).

119. Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (Comprehensive Omnibus Budget Reconciliation Act of 1985), Pub. L. No. 99-272 (1986).

120. *See Marriage is a Worker's Issue*, GAY & LESBIAN ADVOCATES & DEFENDERS, at 1 (2004), available at <http://www.glad.org/rights/marriageisaworkersissue.pdf> (describing the importance of marriage in terms of workplace benefits).

121. For example, where leave is not permitted for an employee to care for a sick same-sex partner, the employee must choose between maintaining his or her employment or caring for the partner.

## 2. There is No Federal Protection for Workplace Discrimination Based on Sexual Orientation

Workers in committed same-sex relationships are unable to reap many work-related benefits that are based on marital status. Equally disturbing, though, is that because of the absence of federal legislation, there is nothing to protect gay workers from being treated differently because of their sexual orientation. Title VII of the Civil Rights Act of 1964 protects workers from discrimination based on “race, color, religion, sex, or national origin,”<sup>122</sup> and courts have so far refused to extend it to protect homosexual employees from disparate treatment based on sexual orientation. In *Simonton v. Runyon*, one of the more recent cases to address the issue, a postal worker filed suit after being harassed regularly at work.<sup>123</sup> While the Second Circuit described the harassment to which Simonton was subjected as “morally reprehensible,”<sup>124</sup> it declined to extend Title VII to protect workers on the basis of sexual orientation.<sup>125</sup>

There were attempts in Congress to rectify this problem. When DOMA was passed, the Employment Non-Discrimination Act (ENDA), which would make it unlawful for an employer to use sexual orientation as a basis for hiring, dismissal or promotion, was introduced.<sup>126</sup> However, ENDA has never received enough support and there remains no protection at the federal level to safeguard workers who are, or are perceived as, gay or lesbian from disparate, unfair, or otherwise discriminatory treatment.

Gay and lesbian workers receive some protection from state and local non-discrimination laws and employer non-discrimination policies. Fourteen states prohibit discrimination in both the public and private workplace;<sup>127</sup> more than 150 counties or towns have done the same.<sup>128</sup> An

---

122. Civil Rights Act of 1964, 42 U.S.C.A. §2000e-2 (2000) (making it unlawful for an employer to hire, fire, otherwise discriminate against an individual based on any of the above cited qualities).

123. 232 F.3d 33 (2nd Cir. 2000). See also *id.* at 35 (“Simonton’s sexual orientation was known to his co-workers who repeatedly assaulted him with such comments as ‘go fuck yourself, fag,’ ‘suck my dick,’ and ‘so you like it up the ass?’ Notes were placed . . . with Simonton’s name and the name of celebrities who had died of AIDS.”).

124. *Id.* at 35.

125. See *id.* (“The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.”).

126. Eric Schmitt, *Senate Weighs Bill on Gay Rights on the Job*, N.Y. TIMES, Sept. 7, 1996, at A1 (“The bill, the Employment Nondiscrimination Act, would bar an employer from using sexual orientation as a basis for hiring, dismissal, promotion, demotion or changing pay.”).

127. See *The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans 2003*, HUMAN RIGHTS CAMPAIGN FOUNDATION, at 31 tbl.7 (2004), available at <http://www.hrc.org/Template.cfm?Section=20042&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18678> (indicating that California, Connecticut, Hawaii,

employee in a locality without a non-discrimination law may be protected—at least outside the law—by an employer’s non-discrimination policy. Seventy-two percent of Fortune 500 companies have written non-discrimination policies that include sexual orientation, though the smaller the company, the less likely it is to include sexual orientation in its non-discrimination policy or to have any such policy.<sup>129</sup> However, state and local laws and company non-discrimination policies are unable to ensure that gay and lesbian workers and their partners receive access to many of the same benefits and privileges that “traditional” employees receive.

*B. After Goodridge, Massachusetts Law is at Odds With DOMA*

1. Massachusetts’ Non-Discrimination Act Prohibits Disparate Workplace Treatment Based on Sexual Orientation

Massachusetts is one of the fourteen states that have enacted legislation prohibiting sexual orientation discrimination in the workplace, regardless of whether it is public or private.<sup>130</sup> The Massachusetts non-discrimination law makes it unlawful not only to refuse to hire or to dismiss from employment on the basis of sexual orientation, but also to “discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.”<sup>131</sup> Pre-*Goodridge*, the Massachusetts non-discrimination law was never interpreted to require an employer to offer a homosexual employee and partner all of the same benefits as a married heterosexual employee and spouse, even though the homosexual employee’s inability to marry was based on sexual orientation. But the combination of *Goodridge* and the Massachusetts law suggests that

---

Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Wisconsin all prohibit sexual orientation discrimination in the workplace). *Cf. id.* (noting that eleven states—Alaska, Arizona, Colorado, Delaware, Illinois, Indiana, Kentucky, Michigan, Montana, Pennsylvania, and Washington—prohibit discrimination based on sexual orientation in the public sector only).

128. *See id.* at 6 (“At the end of 2003, 285 cities, counties and government organizations provided some level of protection against employment discrimination based on sexual orientation. Of those, 152 extend protections to employment in the private sector as well.”).

129. *See id.* (noting that forty-nine of the Fortune 500 companies protect against discrimination based on sexual orientation, while 360 of the Fortune 500 do so). *See also id.* (“The Human Rights Campaign Foundation tracked a total of 2,253 private employers and colleges and universities that included sexual orientation in their organization’s primary equal employment opportunity or non-discrimination policy as of Dec. 31, 2003.”)

130. *See* MASS. GEN. LAWS ch. 151B, §§ 1–10 (2002) (prohibiting discrimination based on race, color, religious creed, national origin, ancestry, or sex). *See also supra* note 129 and accompanying text.

131. *Id.* § 4.

employers are now required to offer all of the same benefits and compensation to married employees with same-sex spouses as those with opposite-sex spouses.

2. DOMA Restricts Massachusetts' Ability to Determine What Rights and Benefits it Extends to Homosexual Workers and Their Spouses

The obligations of an employer and the rights of an employee are far more complicated than one would expect. DOMA, which was enacted to "protect" states' rights,<sup>132</sup> has created much uncertainty and has actually limited Massachusetts' right to determine what protections it offers to gay workers. DOMA defines "marriage" as between a man and a woman; "spouse" is defined as a person of the opposite sex.<sup>133</sup> The Act requires that these definitions apply to all Acts of Congress, and any ruling, regulation, or interpretation of any United States administrative agency or bureau.<sup>134</sup> According to the United States General Accounting Office, DOMA implicates 1,138 federal statutory provisions that relate to rights and privileges.<sup>135</sup> The filing of income tax returns illustrates the great impact of DOMA and the federal statutory provisions the Act affects. Massachusetts obviously recognizes same-sex marriages for state income tax purposes, because that is one of the rights and privileges created by civil marriage. But because DOMA requires the government to deny recognition of same-sex marriages, there are federal tax implications. In addition to being denied the federal tax benefits that opposite-sex married couples receive, same-sex married couples must prepare at least twice as many returns.<sup>136</sup> The Commonwealth of Massachusetts Department of Revenue issued a Technical Information Release to advise same-sex married couples on their tax obligations in light of the different recognition their union receives at the state level and at the federal level. The release advises that:

Federal law does not recognize same-sex civil marriage, and

---

132. See *supra* notes 89 and 90 and accompanying text.

133. See *supra* note 91 and accompanying text.

134. See *supra* note 91 and accompanying text.

135. GAO-04-353R, Defense of Marriage Act, Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, to The Honorable Bill Frist, Majority Leader, United States Senate (Jan. 23, 2004) available at <http://www.gao.gov/new.items/d04353r.pdf> ("[A]s of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.").

136. See Kimberly Blanton, *With Marriage, Gay Couples Face Tax Tangles*, BOSTON GLOBE, Mar. 14, 2005 available at [http://www.boston.com/news/specials/gay\\_marriage/articles/2005/03/14/with\\_marriage\\_gay\\_couples\\_face\\_tax\\_tangles/](http://www.boston.com/news/specials/gay_marriage/articles/2005/03/14/with_marriage_gay_couples_face_tax_tangles/) (describing the extra steps that same-sex couples must take).

same-sex spouses will remain individual filers for federal purposes. Where elements of Massachusetts taxation derive from federal law, such as the definition of gross income, or state deductions that are based on a federal counterpart, same-sex spouses may need to perform special calculations to arrive at the proper Massachusetts tax figure.<sup>137</sup>

Same-sex couples must first fill out a federal tax return that will never be submitted to the IRS.<sup>138</sup> Instead, they will use this joint married filing to calculate their state taxes, which are modeled off of federal calculations.<sup>139</sup> They will then use the fake federal tax return to prepare a joint filing in Massachusetts, followed by two individual filings for the federal government,<sup>140</sup> because DOMA restricts the federal government from recognizing their legal marriage.<sup>141</sup>

In addition to having great consequences for same-sex married couples for income tax purposes, many of the federal statutory provisions relate either directly or indirectly to employment and employee benefits. Among these provisions is the Employee Retirement Income Security Act (ERISA), which sets “minimum standards for most *voluntarily* established pension and health plans in private industry to *provide protection* for individuals in these plans.”<sup>142</sup> Therefore, the Massachusetts non-discrimination law and *Goodridge*, which repealed the commonwealth’s prohibition on same-sex marriage, directly conflict with federal policy that defines marriage as a legal union between one man and one woman.

C. *The Conflict Between Massachusetts Law Under the Non-Discrimination Act, Goodridge, and DOMA Suggests That an Employer Might Attempt to Adopt the Federal Definition of Marriage to Avoid Recognizing Same-Sex Spouses*

This conflict creates the possibility that an employer could attempt to adopt the federal definition of spouse from DOMA and refuse to provide same-sex married couples in Massachusetts with the same marital benefits

---

137. *Technical Information Release 04-17*, Massachusetts Tax Issues Associated with Same-Sex Marriages, Mass. Dept. of Revenue (July 7, 2004) available at [http://www.dor.state.ma.us/rul\\_reg/tir/tir\\_04\\_17.htm](http://www.dor.state.ma.us/rul_reg/tir/tir_04_17.htm).

138. See Blanton, *supra* note 136 (“But before they can do anything, they must fill out a “phantom” federal tax return the IRS will never see: a joint married filing prepared solely to determine their state taxes, which are based on federal calculations.”).

139. See *supra* footnote 136 and accompanying text.

140. See *id.* (describing the elaborate process that same-sex married couples in Massachusetts face when filing their taxes).

141. See *supra* note 94 and accompanying text.

142. United States Department of Labor, *Health Plans & Benefits: Employee Retirement Income Security Act*, <http://www.dol.gov/dol/topic/health-plans/erisa.htm> (last visited Jan. 7, 2006) (emphasis added).

as opposite-sex couples. The Supremacy Clause of the United States Constitution states that the Constitution and “the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”<sup>143</sup> Because of the Supremacy Clause, an employer in Massachusetts might claim that DOMA releases any obligation to provide equal—or any—benefits to same-sex spouses. In fact, some employers operating in Massachusetts are already using federal law to justify denying certain benefits to gay employees and their same-sex spouses.<sup>144</sup> Some companies, including FedEx Corp., have chosen not to extend their health plans to same-sex spouses of gay workers. Because those health plans are regulated by federal statutes, DOMA applies and the companies have chosen to treat same-sex marriages differently than opposite-sex marriages, even though they could choose otherwise.<sup>145</sup> In a memorandum sent to a gay employee who inquired about health benefits for her same-sex spouse, FedEx wrote that it “is not discriminating against you because of your sexual orientation. Rather, the company is following the terms and conditions of its benefit plan.”<sup>146</sup>

1. *Mondou v. New York*

In *Mondou v. New York*, the Supreme Court considered whether a state could ignore a federal law with which it disagrees.<sup>147</sup> The case involved the personal representative of a deceased railway employee who was injured and killed while working.<sup>148</sup> The personal representative sued under a federal statute, which limited recovery to his wife.<sup>149</sup> The state statute would have split equally any recovery between the deceased’s wife and sister.<sup>150</sup> The Court held that when state law conflicts with federal policy, the federal policy overrides because it “[speaks] for all the people and all the states, and thereby [is] established [as] a policy for all.”<sup>151</sup> Similarly, in *Testa v. Katt*, the Court stated that a federal act is “the

---

143. U.S. CONST. art. VI, cl. 2.

144. See Kimberly Blanton, *Firms Block Gays’ Benefits, Cite U.S. Law*, BOSTON GLOBE, Dec. 18, 2004, at A1 (“Some of the largest employers in Massachusetts have decided not to extend health benefits to spouses of gay and lesbian employees . . .”).

145. See *id.* (describing the type of self-insured health plan that these employers use).

146. *Id.*

147. 223 U.S. 1 (1912).

148. See *id.* at 3–4 (describing the death of the railway worker and other events leading up to the lawsuit).

149. See *id.* at 5 (“[I]f the statutes of Montana were applicable, the recovery should be for the equal benefit of the widow and sister, and not for the exclusive benefit of the widow, as prayed in the complaint, and as provided in the act of Congress.”).

150. *Id.*

151. *Id.* at 57.



prevailing policy in every state.”<sup>152</sup> Therefore, even when two laws—one coming from the state and one coming from the United States—are not directly at odds with each other, if the federal law creates more than just a law and constitutes a policy, and that policy conflicts with the state law, the interfering state law is impermissible.

## 2. DOMA Establishes Federal Policy Regarding Same-Sex Marriage

DOMA’s declaration that marriage is a relationship between only a man and a woman establishes federal policy regarding marriage. Proponents of DOMA sought not only to allow individual states to decide not to honor same-sex marriages from other states, but also to discourage and limit a state’s ability to confer the same legal status on same-sex couples as on opposite-sex couples. Prior to DOMA’s enactment, the Judiciary Committee wrote that the Act “is appropriately entitled the ‘Defense of Marriage Act.’ . . . marriage should be preserved in its current form . . . .”<sup>153</sup> The report also stated the government’s interests in DOMA include “defending and nurturing the institution of traditional, heterosexual marriage . . . [and] defending traditional notions of morality . . . .”<sup>154</sup> Therefore, the government’s policy is that marriage is only between one man and one woman and that this definition of marriage is being threatened and must be protected. This federal policy comes into direct conflict with Massachusetts law because the commonwealth permits same-sex marriage and forbids sexual orientation from being a factor in determining compensation and benefits in employment.

## 3. An Employer Cannot Use DOMA to Ignore Massachusetts’ Laws

Despite this conflict of laws, an employer cannot argue that *Mondou* and *Testa* make it permissible to ignore the commonwealth’s laws. First, although DOMA clearly sets forth a federal policy, it also states that its definitions of “marriage” and “spouse” apply to “the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States.”<sup>155</sup> There is no ambiguity to construe. The language used by the drafters of DOMA makes it clear that they deliberately limited the applicability of the Act’s definition of marriage to federal issues.<sup>156</sup> Therefore, the definitions, which are the

---

152. 330 U.S. 386, 393 (1947).

153. H.R. REP. NO. 104-664, at 12 (1996) (emphasis added).

154. *Id.* at 12.

155. See *supra* note 91 and accompanying text.

156. *Id.* (“[T]he meaning of any Act of Congress, or of any ruling, regulation, or

part of the Act that conflict with Massachusetts law, apply only at the federal level.

Secondly, Congress has no power to regulate marriage. The members of the Judiciary Committee who supported DOMA even conceded this.<sup>157</sup> Furthermore, in *Ex parte Burrus*, the Supreme Court stated that “[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.”<sup>158</sup> Thus, the federal government cannot override a state’s ability to determine its own marriage laws and so DOMA cannot be read to nullify same-sex marriage rights in Massachusetts. If anything, it unlawfully interferes with those rights.

Finally, DOMA does not prevent same-sex couples from marrying in Massachusetts. Instead of interfering with the actual right to enter into the unions, DOMA discourages same-sex unions by preventing gay couples from obtaining the federal benefits that are associated with marriage. These federal benefits are numerous.<sup>159</sup> Although the state gets to determine its own marriage laws, the federal government retains its own powers relating to the marriage. For example, the federal government can, and through DOMA does, prevent same-sex married couples from filing joint income tax returns. That privilege is limited to “traditional” married couples. This amounts to yet another form of discrimination. Even though the federal government does not have the power to regulate marriage, because marriage implicates so many other rights,<sup>160</sup> DOMA allows Congress to limit a state’s ability to govern domestic relations.<sup>161</sup>

*D. An Employer’s Obligation to Provide a Benefit Is Determined by Whether That Benefit Is Governed by a Federal Statute*

A Massachusetts employer cannot adopt the federal definition of spouse from DOMA in order to completely disregard the same-sex marriage and treat employees with same-sex spouse differently from those with opposite-sex spouses. Instead, for state-created benefits, the employer must recognize same-sex marriage as equal to opposite-sex marriages, while for federally-governed benefits, an employer can disregard the

---

interpretation of the various administrative bureaus and agencies of the United States.”).

157. H.R. REP. NO. 104-664, at 3 (“The determination of who may marry in the United States is uniquely a function of state law. That has always been the rule, and [DOMA] in no way changes that fact.”)

158. 136 U.S. 586, 593–94 (1890). *See also* *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (stating that marriage has always been left to the state legislatures).

159. *See supra* note 138 and accompanying text.

160. *See supra* note 105 and accompanying text.

161. *See* *Burnet v. Harmel*, 287 U.S. 103, 110 (1932) (“[S]tate law creates legal interests but the federal statute determines when and how they shall be taxed.”).

otherwise completely legal same-sex marriages. Most benefits are, in fact, governed by the Employee Retirement Income Security Act (ERISA), a federal statute.<sup>162</sup> If a benefit is not governed by a federal act like ERISA, then *Goodridge* and the Massachusetts non-discrimination law must apply, because DOMA is irrelevant. Examples of these non-federal benefits include bereavement plans and unfunded vacation benefits. However, if the benefit is created or governed by a federal Act like ERISA, then an employer may not be obligated to provide that benefit. The determination of whether an employer is obligated to provide a benefit that falls under ERISA turns on whether the benefit is insured or not.

Insured ERISA programs that extend benefits or coverage to spouses, like some health insurance, dental insurance, and life insurance plans, fall outside the scope of DOMA. This is because insurance is covered by the McCarran-Ferguson Act, which gives states the power to regulate it.<sup>163</sup> The Act also gives supremacy to state law when it conflicts with federal law on issues of insurance, such as with ERISA.<sup>164</sup> Therefore, health and other insured employee benefit plans are governed by state law, requiring a Massachusetts employer to provide the same privileges to married homosexual workers and their same-sex spouses as to traditional married workers and spouses.

Uninsured ERISA programs, which include pension plans, 401(k) plans, and most deferred compensation plans, are affected by DOMA and its definitions of “marriage” and “spouse.” Included in this “uninsured” category are health insurance plans that are self-insured by the employer. Moreover, ERISA pre-empts any state law that relates to an employee benefit plan (with a few exceptions, including one for the McCarran-Ferguson Act).<sup>165</sup> This relieves Massachusetts employers of any obligation to extend equal—or even any such—benefits to same-sex spouses.

Although many health insurance plans fall under the “insured” ERISA category, which protects gay employees and same-sex spouses from discrimination under state law, most choose to offer uninsured health

---

162. See GOODWIN PROCTER LLP, *Law Breakfast Seminar: Same-Sex Marriage in Massachusetts: Employee Benefits and Employment Law Implications* (May 4, 2004) (noting that the majority of employee benefits plans fall under ERISA). See also *infra* note 156 and accompanying text.

163. See 15 U.S.C. § 1012(a) (“The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”).

164. See 15 U.S.C. § 1012(b) (“No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .”).

165. See 15 U.S.C. § 1144 (ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .”). See also *Boggs v. Boggs*, 520 U.S. 833 (1997) (preempting a Louisiana community property law because it conflicted with ERISA).

insurance plans instead.<sup>166</sup> Under these uninsured—or self-insured—plans, the employer collects the premiums and pays hospital and medical bills, rather than an insurer.<sup>167</sup> Because there is not an insurer, the McCarran-Ferguson Act is not involved and ERISA pre-empts the Massachusetts non-discrimination law. Some employers are deciding not to offer health benefits to same-sex spouses of employees.<sup>168</sup> Fortunately, many employers are voluntarily offering self-insured plans to same-sex spouses.<sup>169</sup>

#### IV. CONCLUSION

Undoubtedly, *Goodridge* was a milestone in the ongoing battle for equal marriage rights. The opportunity for same-sex couples in Massachusetts to marry has afforded gays in the commonwealth with many of the benefits, privileges and protections provided by marriage that had previously been limited to heterosexual couples. But the struggle is far from over. Although efforts to amend the United States Constitution have so far proven unsuccessful, voters in eighteen states have already amended their own constitutions—including thirteen during the fall 2004 elections and two more in 2005—to make same-sex marriage unconstitutional in those states.<sup>170</sup> And amendments are being proposed in other states, curbing the possibility that same-sex marriage will spread to many other states anytime soon.

In fact, in the most progressive state—Massachusetts—and the most promising state—California—Christian groups are leading efforts to

---

166. See Kimberly Blanton, *Firms Block Gays' Benefits, Cite U.S. Law*, BOSTON GLOBE, Dec. 18, 2004, at A1 (reporting that sixty-six percent of large U.S. employers with 500 or more employees use self-insured plans, citing a report by Mercer Human Resource Consulting).

167. See *id.* (describing the uninsured plans that employers claim relieve them of their obligation to provide equal benefits and compensation).

168. *Id.* (noting that some of Massachusetts' largest employers, including FedEx, are not offering health benefits to same-sex spouses).

169. *Id.* ("Many major employers and unions that self-insure gave health benefits to gay workers' spouses in the state.").

170. See *supra* notes 99–100 and accompanying text. The total of eighteen states excludes Hawaii, which amended its constitution to allow the state legislature to ban same-sex marriage, rather than directly banning equal marriage rights, see *supra* note 36 and accompanying text, but includes Nebraska. In 2000, Nebraska voters amended the state constitution to include the clause, "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." NEB. CONST. art. I, § 29 (amended 2000). However, the validity of the amendment remains uncertain pending the appeal of a decision by a federal court in Nebraska which struck down the amendment as unconstitutional. *Citizens for Equal Protection v. Attorney General Bruning*, 368 F. Supp. 2d 980, 1003 (D. Neb. 2005).

regress the achievements that equal rights proponents have already achieved. As the debate continues in Massachusetts, opponents of same-sex marriage say they have gathered enough signatures to get an initiative banning same-sex marriage on the ballot.<sup>171</sup> In California, two groups have proposed measures that would amend the state constitution and remove existing domestic partnership rights.<sup>172</sup> Despite the continuing struggle, progress continues. On the same day that Texas voters amended their constitution to ban same-sex marriage, voters in Maine rebuffed conservative-backed efforts to repeal a state law that prohibits discrimination based on sexual orientation and gender identity.<sup>173</sup> And in October, Connecticut became the third state to offer civil unions to same-sex couples—and the first whose legislature approved such unions without a court directive.<sup>174</sup> Moreover, the number of countries providing marriage or partnership rights to same-sex couples continues to grow while the United States falls behind.<sup>175</sup>

But in many ways—1,138 to be precise—these battles at the state level mean little until progress is made at the federal level.<sup>176</sup> Even after less than two years, same-sex marriage in Massachusetts provides ample evidence to indicate that equal marriage rights at the state level are, on their own, inadequate. Despite the setbacks in many states, recent developments in California, Connecticut, and Maine are promising. But employers and employees in those states will face the same roadblocks as they have in Massachusetts. In order for homosexuals and their same-sex partners to achieve true legal equality in life and in employment, Congress must repeal DOMA and afford homosexual couples protection from discrimination. By

---

171. *Gay Marriage Opponents Push Mass. Ballot*, N.Y. TIMES, Dec. 7, 2005 (describing a 2008 Massachusetts ballot initiative that would amend the state constitution thereby eliminating gay marriage). A previous proposal was well-received by the state legislature but ultimately failed. *Id.* ("The Legislature responded with a proposed constitutional amendment that would have banned gay marriage but allowed civil unions. That amendment won initial approval but failed earlier this year in a second round of voting.").

172. Alexa H. Bluth, *Measures Seek to Ban Gay Marriage*, SACRAMENTO BEE, July 31, 2005, at A3 (describing the initiatives, which the groups hope to have on the ballots in June, 2006).

173. James M. Broder, *The 2005 Elections: Referendums: In a Rebuke of Governor, California Voters Reject Spending Cap*, N.Y. TIMES, Nov. 9, 2005, at A24.

174. David A. Fahrenthold, *Connecticut's First Same-Sex Unions Proceed Civilly; Little Hoopla Surrounds Occasion*, WASH. POST, Oct. 2, 2005, at A3.

175. See Alan Cowell, *Gay Britons Signing Up as Unions Become Legal*, N.Y. TIMES, Dec. 6, 2005 ("[A] new law permitting what are called civil partnerships came into force" on December 5, 2005 in Britain); Michael Wines, *Same-Sex Unions to Become Legal in South Africa*, N.Y. TIMES, Dec. 2, 2005, at A12 ("South Africa's highest court ruled . . . that same-sex marriages enjoyed the same legal status as those between men and women . . . [and that] the refusal to give legal status to gay marriages, though grounded in common law, violated the Constitution's guarantee of equal rights.").

176. See *supra* note 135 and accompanying text.

repealing DOMA, Congress would grant states the full power to define marriage and determine what rights and benefits accompany the legal union, allowing Massachusetts, or any state that eventually permits same-sex couples to marry, the ability to provide true marriage equality. Congress must also follow the lead of the numerous states and municipalities that have made it unlawful for an employer to discriminate against an employee because the employee is gay.<sup>177</sup>

Despite the recent passage in various states across the country of constitutional amendments prohibiting same-sex marriage, perhaps *Goodridge* is a sign of things to come. Despite Governor Schwarzenegger's successful veto of the Religious Freedom and Civil Marriage Protection Act, same-sex marriage could become legal through the courts. In *Woo v. Lockyer*, which resulted from the issuance of marriage licenses to gay couples in San Francisco, a California Superior Court Judge recently heard a challenge to two state laws that limit marriage to opposite-sex couples.<sup>178</sup> The judge's ruling contained several significant statements. He held that tradition is inadequate to justify the discrimination caused by limiting marriage to opposite-sex couples.<sup>179</sup> The state offered two main reasons to justify the prohibition on same-sex marriage: (1) heterosexual couples make better families and parents; and (2) because many of the rights traditionally conferred by marriage are already granted to same-sex couples, the state was not discriminating.<sup>180</sup> The judge rejected both arguments.<sup>181</sup> Procreation is not a rational reason for limiting marriage to opposite-sex couples because they can marry whether or not they decide to procreate. With respect to the state's second reason, he noted:

[T]he existence of marriage-like rights without marriage actually cuts against the existence of a rational government interest for denying marriage to same-sex couples. California's enactment of rights for same-sex couples belies any argument that the State would have a legitimate interest in denying marriage in order to preclude same-sex couples from acquiring some marital right that

---

177. See *supra* notes 99–100 and accompanying text.

178. *Woo v. Lockyer*, Proceeding No. 4365, Tentative Decision (Cal. Sup. Ct. Mar. 14, 2005), available at <http://www.sftc.org/Docs/marriage.pdf>.

179. See *id.* at 7–8:

California's traditional limit of marriage to a union between a man and a woman is not a sufficient rational basis to justify [the state's statutes that prohibit marriage between same-sex couples]. Simply put, same-sex marriage cannot be prohibited solely because California has always done so before.

180. See *id.* at 9 (noting the state's reasons for the marriage statutes).

181. See *id.* (stating that the state's reasons are inadequate).

might somehow be inappropriate for them to have.<sup>182</sup>

Additionally, he held that the marriage statutes “create classifications based upon gender.”<sup>183</sup> As a result, the judge ruled that it is unconstitutional for the state to deny the fundamental right of marriage to same-sex couples.<sup>184</sup> While there will certainly be appeals, the judges’ tentative decision in *Woo* provides even more ammunition to ensure that the veto by Governor Schwarzenegger does not end the debate while the federal government sits this one out.

---

182. *Id.*

183. *Id.* at 19.

184. *See id.* at 20 (holding that the state’s ban on same-sex marriages is unconstitutional).